1981

Robert S. Nielson And Ila Dean Nielson v. Central Waterworks Company, A Utah Corporation, And The State of Utah, By And Through Its Division of Water Resources : Brief of Respondents

Utah Supreme Court

Original Brief submitted to the Utah Supreme Court; funding for digitization provided by the Institute of Museum and Library Services through the Library Services and Technology Act, administered by the Utah State Library, and sponsored by the S.J. Quinney Law Library; machine-generated OCR, may contain errors. Tex R. Olsen; Attorneys for Respondent, Central Waterworks CompanyDallin W. Jensen and Michael M. Quealy; Attorneys for Respondent, Utah Division of Water ResourcesGeorge A. Hunt and Bryce D. Panzer; Attorneys for Appellants

IN THE SUPREME COURT OF THE STATE OF UTAH

* * * * * * * * * * * *

ROBERT S. NIELSON and ILA DEAN NIELSON,

Plaintiffs and Appellants,

-vs-

CENTRAL WATERWORKS COMPANY, a Utah corporation, and the STATE OF UTAH, by and through its Department of Water Resources,

Defendants and Respondents.

* * * * * * * * *

BRIEF OF [illegible]

* * * * * * * * *

Appeal from the [illegible]
Sixth Judicial District
Honorable Don V. Tibbs

George A. Hunt
Bryce D. Panzer
Snow, Christensen & Martineau
700 Continental Bank Bldg.
Salt Lake City, Utah 84101
Telephone: 521-9000
Attorneys for Appellants

IN THE SUPREME COURT OF THE STATE OF UTAH

* * * * * * * * * * * *

ROBERT S. NIELSON and ILA DEAN NIELSON, Plaintiffs and Appellants,	)	
-vs-	)	CASE NO. 17333
CENTRAL WATERWORKS COMPANY, a Utah corporation, and the STATE OF UTAH, by and through its Department of Water Resources, Defendants and Respondents.	)	

* * * * * * * * * * * * * * * * * * * *

BRIEF OF RESPONDENT

* * * * * * * * * * * * * * * * * * * *

Appeal from the Judgment of the
Sixth Judicial District Court of Sevier County
Honorable Don V. Tibbs, District Judge, Presiding

Tex R. Olsen
Olsen and Chamberlain
76 South Main Street
Richfield, Utah 84701
Telephone: 896-4461
Attorneys for Respondent,
Central Waterworks Company

George A. Hunt
Bryce D. Panzer
Snow, Christensen & Martineau
700 Continental Bank Bldg.
Salt Lake City, Utah 84101
Telephone: 521-9000
Attorneys for Appellants

Dallin W. Jensen
Michael M. Quealy
Assistants Attorney General
301 Empire Building
231 East 400 South
Salt Lake City, Utah 84111
Telephone: 533-4446
Attorneys for Respondent,
Utah Division of Water Resources

TABLE OF CONTENTS

BRIEF OF RESPONDENT

AUTHORITIES CITED

CASES

STATUTES

CONSTITUTIONAL PROVISIONS

IN THE SUPREME COURT OF THE STATE OF UTAH

* * * * * * * * * *

ROBERT S. NIELSON and ILA DEAN NIELSON, Plaintiffs and Appellants, -vs- CENTRAL WATERWORKS COMPANY, a Utah corporation, and the STATE OF UTAH, by and through its Department of Water Resources, Defendants and Respondents.	) :) :) :) :) :) :) :) :) :) :	BRIEF OF RESONDENT CENTRAL WATERWORKS COMPANY Case No. 17333

* * * * * * * * * * * * * * * * * * * *

NATURE OF THE CASE

Plaintiffs brought an action against the Central Waterworks Company and the State of Utah claiming they were entitled to a judgment of the District Court declaring the action of Central Waterworks Company in denying an application for 18 culinary water hookups was arbitrary and a denial of Plaintiffs' constitutional rights and for a mandate requiring the corporation to grant the Plaintiffs the 18 hookups applied for as well as damages incurred by reason of the denial.

DISPOSITION IN LOWER COURT

Central Waterworks Company and the State of Utah made separate motions for summary judgment against the Plaintiffs. The motions for summary judgment were heard by the District Court on

August 20, 1980. On August 26, 1980, the Court entered an O granting the separate motions for summary judgment of the De dants.

RELIEF SOUGHT ON APPEAL

This Defendant seeks to have affirmed the judgments entered by the Lower Court.

STATEMENT OF FACTS

Appellants' Statement of Facts is not supported by a record before the Court. The facts before the Lower Court we set forth in the affidavit of H. Conrad Hansen (R.49 through R.70). Appellants filed no opposing affidavits under Rule 56 of the Utah Rules of Civil Procedure. Therefore, the uncontro facts are:

1. Central Waterworks Company, is a Utah corporatio organized for the sole purpose of owning culinary water right installing culinary water system and operating a water syste the benefit of its stockholders. (R.49; see also R. 61, §2,

2. It is operated by officers and a Board of Direct elected by the stockholders. Its Articles of Incorporation l the sale of shares of its capital stock in order that no more 250 shares can be issued (R.56, ¶Fifth).

3. On or about August 31, 1973, Respondent Central Waterworks Company borrowed money from the State of Utah thro its Department of Water Resources, for the purpose of improv its water system. One of the requirements of the financing t that the Respondent Central Waterworks Company convey its as

to the State of Utah and that it repurchase these assets for the amount advanced by the State for the costs of improvement (R.49 through 50).

4. The State of Utah asserts no control over the beneficial use of the water, the water system or the water rights or to the manner in which Central Waterworks Company conducts its business or offers its stock for sale to interested parties.

5. In September of 1975, Plaintiffs (Appellants here) made application to Central Waterworks Company for 18 water connections for a proposed subdivision of seven acres of real property located near the unincorporated town of Central, Utah. The waterworks company, through its Board of Directors, denied the application as it was presented.

6. No affidavits or other proof is relied upon by the Appellants to show the action challenged was arbitrary.

ARGUMENT

POINT I

A PRIVATE UTAH CORPORATION HAS NO LEGAL OBLIGATION TO SELL ITS SHARES TO MEMBERS OF THE PUBLIC UPON THEIR DEMAND

A. THE DENIAL OF THE APPLICATION OF THE APPELLANTS FOR 18 SEPARATE WATER CONNECTION WAS NOT SHOWN TO BE ARBITRARY.

B. THE DENIAL OF WATER CONNECTIONS BY CENTRAL WATERWORKS COMPANY DID NOT CONSTITUTE STATE ACTION AND WAS SOLELY THE ACT OF A PRIVATE CORPORATION.

The Fourteenth Amendment of the United States Constitution has no application to private conduct. Chief Justice Vincent

summarized, in the case of *Shelley, et ux vs. Kraemer, et ux.*, (1948) 334 U.S. 1; 68 S.Ct. 836, as follows:

> [3] Since the decision of this Court in the Civil Rights Cases, 1883, 109 U.S. 3, 3 S.Ct. 18, 27 L.Ed. 835, the principle has become firmly embedded in our constitutional law that the action inhibited by the first section of the Fourteenth Amendment is only such action as may fairly be said to be that of the States. That Amendment erects no shield against merely private conduct, however discriminatory or wrongful.[1]

The Utah Supreme Court has also had opportunity to determine the question of when a company is a private corporation and not an arm of the State.

The development of private corporations for the distribution of irrigation water, culinary water, cooperative services for processing fruits, vegetables and farm produce and for pick up and delivery and sale of milk and dairy products and many other services has long been established in the State of Utah.

The Utah Supreme Court has had occasion to consider whether such a private corporation with essential or desirable services was a "public utility" under the jurisdiction of the Public Service Commission and therefore had an obligation to sell its shares or deliver its services to third parties on their demand.

---

1 And See *United States vs. Harris*, 1883, 106 U.S. 629, 1 S.Ct. 601, 27 L.Ed. 290; *United States vs. Cruikshank*, 1876, 92 U.S. 542, 23 L.Ed. 588.

It has been held that each company is entitled to be selective and to manage its own business affairs. (See *Garkane Power Company, Inc. vs. Public Service Commission*, 1000 P2d 571 (1940); *State vs. Nielson*, 66 U 457, 235 P 237; *Holmgren vs. Utah Idaho Sugar Company*, 582 P2d 856 (1978); *San Miguel Power Association vs. PSC*, 4 U2d 252, 292 P2d 511 (1956).

In the Utah case of *Garkane Power Company, Inc. vs. Public Service Commission, supra.*, the Court had before it a dispute which required it to determine whether or not Garkane Power Association was a public utility in the business of distributing power for the benefit of the public generally or whether the power company was a private business conducted for the sole benefit of its members. The Court refers to the fact that Garkane did not hold itself out as serving the public generally and that its Articles of Incorporation provided that only a certain restrictive group (members) were served and stated:

> The distinction there made is valid, and is conclusive of this case. Garkane does not propose to hold itself out to serve all who apply and live near its lines; its very charter which gives it existence restricts its service to a certain group (members). It does not propose to serve "the public generally", but only to serve its members.
>
> The test* * * is * * * whether the public has a legal right to the use which cannot be gainsaid, or denied, or withdrawn at the pleasure of the owner. *Farmer's Market Co., vs. R. R. Co.*, 142 Pa. 580, 21 A. 902, 989, 990.

> The essential feature of a public use is that it is not confined to privilege individuals, but is open to the indefinite public. It is this indefiniteness or unrestricted quality that gives it its public character. *Thayer vs. California Development Board*, 164 Cal. 117, 127, 128, P. 21, 25.

The Utah Supreme Court then went on to hold that despite the fact that "membership" in Garkane is easy to obtain, the character of the corporation was not affected and it was not a public utility.

In the *Garkane Power Company, Inc.* case (supra) the Utah Supreme Court also reaffirmed the holding in the Utah case of *State vs. Nielson*, 66 U 457, 235 P 237. In that case the Utah Public Utilities Commission attempted to assert its jurisdiction over the activities of a person who, under contract, transported guests to and from a summer resort. In holding that such transportation services did not constitute *Nielson* a common carrier, the Court stated:

> * * *Public service (is) serving and carrying all persons indifferently who apply for passage or for shipment of goods or freight. Public service as distinguished from mere private service, is thus a necessary factor to constitute a common carrier.

Under the Articles of Incorporation of Central Waterworks Company (R.55-59) the waterworks company is obligated to serve "the owners of capital stock of this corporation". As a matter of fact, the incorporators have required a limit of 250 shares to be placed upon stock which may be sold at the discretion of the company (R.56).

The sale of stock guarantees a water hookup and water service. The reason for such limitation in number of stockholders is very apparent; the incorporators insisted upon prohibiting the division of the limited water right of the company and its limiting facilities to a point that it would not adequately serve the existing stockholders. The water company has no obligation to serve the public generally but is only obligated to serve the interests of its stockholders. The corporation is a private corporation organized to serve its specifically-defined objectives.

One of the company's By-Laws provides:

(R.60)

> Section 2. Rights of Stockholders. Each member and holder of capital stock shall be entitled to receive from the company's water system for domestic purposes that proportionate share of water carried by or through the distributing facilities of the company that each shareholder's stock bears to the total number of shares outstanding at that time and provided all assessments, due, charges and levies made under their Articles or these By-Laws shall be fully paid and current.

This Court further considered the case of the private character of a company in a business generally classified as a utility service. In the case of *Holmgren vs. Utah Idaho Sugar Company*, 582 P2d 856 (Utah 1978) this Court stated that the canal company is not selling a commodity. The "service" if it be such, for the delivery of water, is a matter of contract of a limited class, not the public at large.

The foregoing discussion is to demonstrate the private character of the Central Waterworks Company and that it was not public in nature and any way regulated, directed or held out to

be a "public" institution and an arm of the State of Utah. Th additional question raised by the Appellants as to whether sta financial assistance by a loan to Central Waterworks Company would change the character of the corporation and make it an a of the State of Utah in order that its action would be "state action", is discussed in a following section of this brief.

A. THE DENIAL OF THE APPLICATION OF THE APPELLANTS FOR 18 SEPARATE WATER CONNECTIONS WAS NOT SHOWN TO BE ARBITRARY.

There is no record to support any accusation by the Appellants that Central Waterworks Company was arbitrary or discriminatory in denying the Appellants' application for 18 hookups, which the Appellants thought would be beneficial to them and add value to their land. The only record before the Court is that the application was made and that it was denied. It cannot be presumed that it was denied arbitrarily since any business proposition requires the consideration of many factors including water distribution load, present facilities and future plans. No affidavits were filed by Appellants in the Lower Court in accordance with Rule 56(e) which demonstrated any issue existed in this regard or that the Appellants were discriminated against.

Therefore, if the action of Central Waterworks Company was not arbitrary or discriminatory, there would not be a cause of action on the part of the Appellants under any legal theory.

B. THE DENIAL OF WATER CONNECTIONS BY CENTRAL WATERWORKS COMPANY DID NOT CONSTITUTE STATE ACTION AND WAS SOLELY THE ACT OF A PRIVATE CORPORATION.

The Appellants contend that Central Waterworks Company lost its "private" character and became an arm of the state or that there was state action involved because:

1. The waterworks company operated as a "utility" in the distribution of water which was ordinarily a governmental function, and

2. The Central Waterworks Company secured a loan from the State of Utah which required the company to deed its facilities and water right to the State of Utah to secure the loan. The State of Utah under the same agreement enters into a purchase contract with Central Waterworks Company under which the assets are to be reconveyed to the company at the time it pays the amount advanced by the State of Utah under the loan arrangement. (See R.52-54, Loaning Agreement)

It is apparent from the recitals that the State of Utah is to be repaid under the terms of the contract, "the combined total of all funds paid by the State of Utah to the water company, for the construction of the original and amended projects* * * ". (R. 53, ¶6)

The uncontroverted affidavit of H. Conrad Hansen (R. 49, 50, ¶s 4, 5, and 6) establishes the financing arrangement between the State of Utah and the Central Waterworks Company. It establishes the fact Central Waterworks Company borrowed funds from the State of Utah through its Department of Water

Resources for the purpose of improving the waterworks system, the State of Utah has not and does not assert any present beneficial interest in the water rights, land interests and distribution facilitiy for the purpose of management, water distribution or the enactment of public policies; the State of Utah takes no active part through its officers and agents in any management policy affected by the Board of Directors of the Central Waterworks Company; the State of Utah has only a securit interest as a seller under a conditional purchase contract with Central Waterworks Company; that the business of the corporatio is conducted by the corporation as authorized by its Board of Directors and its stockholders.

Under the stated facts in the present case there is clearly no state action which would cause the Defendant Central Waterworks Company to lose its character as a private corporation and determine that it was an arm of the State of Utah to such an extent that the Fourteenth Amendment of the United States Constitution would apply.

In the case of *Garkane Power vs. Public Service Commis (supra)* Justice Wolfe was confronted with the same argument that public funds were involved and therefore the assets of the power company should be treated as public assets and not privat assets. Justice Wolfe stated for the Court:

> And if we accept the test that the loan of public funds to a cooperative means that it must serve the public generally and is therefore a public utility, we must also class as public utilities, bound to serve the public, all of the many hundreds or thousands of business organizations which have borrowed from the federal government through RFD, PCC, etc.

The Utah Supreme Court has clearly rejected the argument of public financing making a company a public corporation or an arm of the State of Utah.

The United States courts have had many occasions to consider the same question of whether mere public financial involvement in a business so affected that business that there could be a finding of state action under various civil rights actions.

In the case of *Trivits vs. Wilmington Institute* (1976 DC Del) 417 F Supp 160, the Court stated:

> Mere governmental financial involvement in public function or in business affected with public interest is insufficient to predicate finding of state action under 42 USCS § 1983.

In the case of *Greco vs. Orange Memorial Hospital Corporation* (1974, DC Tex) 374 F Supp 227, affd (CA5 Tex) 513 F2d 873, and cert den 423 U.S. 1000, 46 L.Ed2d 376, 96 S.Ct. 433, the Court held that a private hospital operated by a non-profit corporation prohibiting performance of abortion was not acting under state law, although it received significant amounts of monetary support from governmental sources, where county and state remained completely neutral on medical policy.

Also, in the case of *Holton vs. Crozer-Chester Memorial Center*, (1976, DC Pa) 419 F. Supp 334 (CA 3 Pa) 560 F2d 575, the fact that a private non-profit hospital benefitted from government funding, regulation and tax exemptions did not compel finding that such symbiotic relationship existed between hospital and state that all of the hospital's activities could properly be considered "state action".

The U. S. Supreme Court also found that an action of privately-owned and operated utility company, having state certificates of public convenience, in terminating electric service a householder for non-payment of bills, without notice to the householder, hearing, or an opportunity to pay the account, did constitute "state action" in a suit brought under the Federal Civil Rights Act, even though the company was engaged in a business affected with the public interest, was subject to extensive state regulation in many particulars, and enjoyed at least a partial monopoly within its service area. (*Jackson vs. Metropolitan Edison Company*, (1974) 419 U.S. 345, 42 L.Ed2d 477, 95 S.Ct. 449)

Clearly there are no facts in this case which would show any agency between the State of Utah and Central Waterworks Company or authorization for the State of Utah to manage its business affairs. The facts demonstrate the State of Utah is completely neutral on the business policies and practices of the waterworks company. The facts do further demonstrate the Central Waterworks Company is a private corporation under the management of its Board of Directors and stockholders.

CONCLUSION

It is respectfully submitted that the action of the Lower Court in granting a Summary Judgment against Plaintiffs was proper and there is no justification for considering the acts of Central

Waterworks Company as other than those of a private corporation. The "civil rights action" of the Appellants was properly dismissed in these proceedings.

We respectfully request this Court to affirm the decision of the Lower Court.

Respectfully submitted,

OLSEN AND CHAMBERLAIN

By _____
Tex R. Olsen

ACKNOWLEDGMENT OF SERVICE

I hereby certify that two (2) copies of the foregoing Brief of Respondent were mailed to Messrs. George A. Hunt and Bryce D. Panzer, Snow, Christensen & Martineau, Attorneys for Appellants, 700 Continental Bank Building, Salt Lake City, Utah (84101) and that two (2) copies were further mailed to Messrs. Dallin W. Jensen and Michael M. Quealy, Assistants Attorney General, Attorneys for Department of Water Resources, 301 Empire Building, 231 East 400 South, Salt Lake City, Utah (84111) by U.S. Mail, Postage Prepaid, on this 5th day of February, 1981.

_____